ELDERS KEEP LTD.

v.

SYKT. TENAGA RAYA & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[CIVIL SUIT NO. D3-23-158-88]
17 JULY 1989

NEGOTIABLE INSTRUMENTS*: Bills of Exchange - Bills of exchange dishonoured - 2nd to 6th defendants sued as guarantors - Bills drawn in England - Whether 'foreign' bills - Non-compliance with s. 54 of the Stamp Ordinance - Expert evidence to be adduced - Liability of guarantors - Proper party to bring this suit - Whether holders in due course or drawer - Section 3(1) Bills of Exchange Act s. 17(2).*

CIVIL PROCEDURE: *Order 14 application - Summary judgment - Defence - Defective statement of claim - Bills of exchange not stamped - Whether admissible - Adducing expert evidence - Whether this entitles leave to defend action - Defendant.*

The plaintiff as a confirming house extended confirming facilities to the 1st defendant and arising therefrom, the 1st defendant accepted 2 bills of exchange. Both bills were dishonoured when presented for payment. The claim against the 1st defendant was for the return of the sums due under the 2 bills of exchange. The 2nd - 6th defendants were sued as guarantors.

Summary judgment under O. 14 was entered against all the defendants. In their appeal, the following issues were raised.

1. That the statement of claim was defective.
2. That the proper party should be Oriental Bank.
3. That the 2 unstamped bills of exchange were inadmissable.
4. Whether expert evidence was necessary.

Held:

[1] As the documentary evidence was clear and explicit that the plaintiff were the drawers of the 2 bills, an omission to describe themselves as drawers was not fatal to the plaintiff's case nor did it prejudice the defendants in anyway.

[2] Since the plaintiff have already made payment to Oriental Bank, they were therefore entitled under s. 59(2) of the Bills of Exchange Act 1949 to bring this action against the 1st defendant.

[3] The fact that the 2 foreign bills were not stamped in accordance with s. 52 of the Stamp Ordinance 1949, did not render them invalid by virtue of proviso (i) of s. 72 of the Bills of Exchange Act. Moreover, there were savings provisions in ss. 43(5) and 47 of the Stamp Ordinance.

[4] Clause 13 of the guarantee allowed the plaintiff to sue the guarantors in any Court that exercised similar jurisdiction as the English Courts. Further, the Malaysian law on guarantees was similar to the English law on guarantees, as such no expert evidence was necessary.

[Appeal dismissed with costs.]

Legislation referred to:
Bills of Exchange Act 1949, ss. 3(1), 17(2), 59(2)(a)
Stamp Ordinance 1949, ss. 4, 43(5), 47, 54, 72, (a)(i)

For the defendants/appellants - C.T. Chan; M/s. A.K. Lee & Co.
For the plaintiff/respondent - K. Kumar; M/s. Allen & Gledhill

JUDGMENT

Siti Norma Yaakob J:

As a confirming house, the plaintiff extended confirming facilities to the 1st defendant and arising therefrom, the 1st defendant have accepted 2 bills of exchange on which this suit is founded.

The first bill dated 11 February 1987 is for US$36,862, payable upon presentation on 11 July 1987 and the second bill dated 29 May 1987 is for RM99,273.08, payable upon presentation on 25 November 1987. However both bills were dishonoured when Oriental Bank, the holder in due course, presented them for payment on the due dates and the claim against the 1st defendant is the return of 2 sums due under the 2 bills of exchange inclusive of interest up to the date of presentation, to reimburse the plaintiff for the sums that they had settled with Oriental Bank.

The 2nd-6th defendants are sued as guarantors pursuant to 4 letters of guarantee, two dated 16 May 1985, and the other two dated 4 July 1985 and 27 March 1986, wherein they agree to pay all sum due from the 1st defendant to the plaintiff, resulting from the confirming facilities extended by the plaintiff to the 1st defendant.

On 5 October 1988, summary judgment under O. 14 was entered against all the defendants and in their appeal against this order, they raised the following issue.

1. The statement of claim is defective in that it failed to disclose in what capacity the plaintiff are suing the 1st defendant.
2. The proper party in this case should be Oriental Bank, the holder in due course.
3. Since the 2 bills of exchange are not stamped, they are inadmissable in evidence.
4. As regards the 2nd - 6th defendants who are sued as guarantors, evidence of experts on the law applicable to their liability is necessary.

A bill of exchange has been defined by s. 3(1) of the Bills of Exchange Act 1949, (the Act), as being "an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to, or to the order of, a specified person, or to bearer".

From the 2 bills, as exhibited by the plaintiff, it is clear that they were signed and issued by the plaintiff, addressed to the first defendant, requiring the 1st defendant to pay out the 2 sums mentioned on the 2 bills on the dates fixed and mentioned in the 2 bills to Standard Chartered Bank. The 1st defendant have also accepted the 2 bills as evidenced by their stamp and the signature of their manager and under s. 17(2) of the Act, such an acceptance is valid.

From para. 4 of the amended statement of claim, it is also averred that plaintiff's claim as against the 1st defendant is as the acceptor of the 2 bills and drawn by the plaintiff upon the 1st defendant in England, payable to the plaintiff on first presentation on 11 July 1987 and 25 July 1987 respectively.

From the pleadings and from the exhibits, it is very clear that the plaintiff are the drawers and the 1st defendants, the acceptors of the 2 bills of exchange.

As the documentary evidence are clear and explicit, I do not consider that an omission to describe themselves as drawers of the 2 bills, can in any way, be fatal to the plaintiff's case nor can it prejudice the defendants in any way.

In this case, the bills were endorsed at the back to Oriental Bank, the holder in due course, the party who protested for non-payment. Under these circumstances, it is the defendants' contention that the proper party who should sue is Oriental Bank and not the plaintiff.

The plaintiff's reply is that they have already settled the amounts due to Oriental Bank, thus entitling them under s. 59(2)(a) of the Act, to sue the defendants for the loss suffered in making good the amounts due to Oriental Bank. This fact however does not appear in the plaintiff's affidavit, as the defendants' objection has not been averred to in any affidavit. For that matter, defendants had chosen not to file any affidavit opposing the O. 14 application as they maintain that such an affidavit is not necessary as all their objections relate to points of law.

As I have no reason to doubt that the plaintiff have already made payment to Oriental Bank, they are therefore entitled under s. 59(2) of the Act, to bring this action against the 1st defendant.

As for the defendants' objection that there has been non-compliance of s. 54 of the Stamp Ordinance 1949 and as such the 2 bills are inadmissable in evidence, a distinction must be made as to whether the bills are inland or foreign bills.

The plaintiffs have a registered office in England and as such, the 2 bills were in England as averred to in para. 4 of the amended statement of claim, but accepted by the 1st defendant in Malaysia. That being the case, the bills are foreign bills as they fall within s. 72 of the Act and therefore not inland bills as defined in s. 4.

Being foreign bills, s. 72(a) and proviso (i) are relevant as to what form such bills should be executed and they state as follows.

> 72. Where a bill drawn in one country is negotiated, accepted or payable in another, the rights, duties and liabilities of the parties thereto are determined as follows:
>
> a) the validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance *supra* protest, is determined by the law of the place where such contract was made:
>
> Provided that:
>
> i) where a bill is issued out of Malaysia it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue;

The fact that the 2 foreign bills are not stamped in accordance with s. 52 of the Stamp Ordinance 1949, does not render them invalid by proviso (i) of s. 72 of the Act. Moreover, there are saving provisions in ss. 43(5) and 47 of the Stamp Ordinance itself, that allow a bill

of exchange drawn out of Malaysia to be stamped after execution and if more than 30 days have expired after it has been received in Malaysia, by payment, in addition to the stamp duty, the penalties prescribed under the two sections.

Thus payment by the plaintiff of the necessary stamp duty and penalty, if any, chargeable under the provisions of either ss. 43 and 47 of the Stamp Ordinance, would therefore render the 2 bills admissable in evidence.

Clause 13 in all the 4 guarantees on which the cause of action against the 2nd - 6th defendants is founded contains identical terms and it states as follows:

> 13. This guarantee shall be provided by English Law.
>
> The guarantors hereby irrevocably submit to the jurisdiction of the Courts of England, provided, however, that nothing herein shall preclude the company, if it thinks fit from instituting proceedings against the guarantors in any country or place which may have jurisdiction for the purpose of protecting and enforcing their rights hereunder ...

Relying on this clause, the defendants' maintain that expert evidence on the English law of guarantee must be adduced to establish the liability of the 2nd - 6th defendants and this entitles the defendants for leaved to defend this action.

Although cl. 13 provides that English law shall govern liability of all the guarantors' that same clause also allows the plaintiff to sue the guarantors in any Court that exercise similar jurisdiction as the English Courts where the plaintiff's rights under the guarantees can be determined and adjudicated. The Malaysian law on guarantees are similar to the English law on guarantees and as such, both under the provision of the guarantees and the law applicable, there is therefore no necessity for any expert evidence to be led in this case.

As the defendants had failed to raise any triable issue in this suit, I had accordingly dismissed their appeal against the O. 14 judgment, with costs.

Also found at [1989] 2 CLJ 1010